STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing No. S-11/15-1219
	)	
Appeal of	)	

INTRODUCTION

Petitioner appeals a decision by the Vermont Department of Disabilities, Aging and Independent living (DAIL) terminating her services under the Choices for Care program. The issue is whether DAIL can terminate those services because the petitioner has remained living out of state beyond the deadline of a three-month-long variance issued to her in 2015. The following facts are based on testimony offered at a telephone hearing held on January 26, 2016. Subsequently, the parties requested time for briefing some of the issues and the record was closed on March 2, 2016.

FINDINGS OF FACT

1. The petitioner is a sixty-five-year-old, disabled woman who employs a personal care provider. The care provider is paid through the Choices for Care program which is operated by the Department of Disabilities, Aging and Independent Living (DAIL). The petitioner has Reflex Sympathetic Dystrophy (RSD) which causes her to sometimes

fall because she is unable to easily move her feet due to pain. She uses a cane and a wheelchair to get around. She also suffers from diabetes, high blood pressure, and obesity. The petitioner receives 3Squares Vermont and regular Medicaid benefits in addition to Choices for Care services.

2. The petitioner determined that she might ameliorate her pain through "ketamine infusion therapy." This therapy employs a course of treatment with the anesthetic ketamine which is commonly used in surgery but which is also used by certain practitioners to relieve pain. "Ketamine infusion therapy" is not offered in Vermont or New Hampshire and is not covered by Vermont Medicaid.

3. The petitioner found a ketamine infusion therapy treatment provider in Florida and she made an appointment with the clinic to undergo this therapy, hoping that Medicare and some borrowed private funds might pay for it. She did not notify DAIL or her case manager that she was planning to leave the state with her caretaker. Her case manager discovered she was gone in the course of another appeal.

4. The petitioner left Vermont on July 28, 2015 with her caretaker and since then has been living in a $59 per night hotel room in Clearwater, Florida. In August of 2015,

when the petitioner's case manager became aware that she was not in Vermont, she reported the absence to DAIL.

5. When DAIL learned of the absence, its clinical coordinator nurse asked the petitioner to make a written request for a variance to receive CFC services while residing out of state, which she did through her case manager on August 21, 2015. In the request, the case manager reported that the petitioner's "advanced health issues (her RSD) is needing treatment. The treatment center is located in Florida. Her caregiver who is paid through CFC is continuing to care for her as this is not a residential facility. She left July 28, 2015 and plans to return in October." She added that the recipient "needs treatment to assist with her pain management and this treatment is not available in VT."

6. Based on that information, on August 27, 2015, DAIL granted a 90-day variance retroactive to July 28, 2015 which was to expire upon the petitioner's "return to Vermont in October 2015."

7. In early November of 2015, the DAIL clinical coordinator contacted the petitioner's case manager to check on her status. The case manager said that she had not returned to Vermont. DAIL asked the case manager to get additional information from the petitioner as to why she had

not returned by October 31, 2015. In response, the petitioner provided a FAX on November 2, 2015, which contained two physician's consultations reports and an appointment for therapy.

8. The first consultation report dated July 30, 2015 was with a physician at the "RSD/CRPS Treatment Center and Research Institute." That physician diagnosed the petitioner as having generalized "complex regional syndrome, type 1 (RSD), with the primary in the left lower extremity" and rated the impairment as "severe." He also noted that the petitioner is at "very high risk for procedures" due to her diabetes, high blood pressure, and obesity. He recommended that the petitioner engage in a shorter four-day course of therapy but advised her that she might want to consult with a general practitioner to see if her high blood pressure and diabetes could be better controlled to "decrease the risk prior to a ketamine infusion."

9. The petitioner also offered an undated consultation from a Florida doctor of internal medicine whom the petitioner says she visited in August of 2015, pursuant to the clinic doctor's advice. That report said:

> [Petitioner] has several chronic medical conditions including but not limited to Diabetes Mellitus, elevated blood pressure, obesity and complex regional pain

> syndrome. Outside records are not available to make a full assessment and a full records release is recommended. I have advised that the patient speak with the provider who will be performing the procedure to be disclosed on all of the risks involved. I have explained to the patient that ketamine has several side effects including but not limited to sedation, rash, nausea, vomiting. Several severe side effects can occur but are more rare including, chest pain, difficulty breathing, swelling of the mouth, lips or tongue, confusion, double vision, irregular heart beat and pain at the site may also occur. The patient is aware that based on her home readings, that her blood sugars are not well controlled and would recommend discussing with her primary care doctor to better optimize control. Again, without full records, we cannot make a good judgement into optimaztion (sic) of her blood sugar. She was also made aware that she is at higher risk for stroke and heart attack given her comorbidities.

10. The petitioner also presented evidence that she had recently made an appointment for the four-day treatment to begin on January 4, 2016. It does not appear from the record that the petitioner had made any appointment for this treatment from the time she was first evaluated in July of 2015 until she was asked for further information in November of 2015.

11. After review of these materials, the DAIL clinical coordinator sent a form letter to the petitioner on November 5, 2015 which contained the rubric “Notice of Termination: Permanent Move Out of State.” In the body of the letter, DAIL told the petitioner that it had been notified that she had moved “permanently out of state” or “will be out of state

for more than the previously awarded travel variance." DAIL notified the petitioner that payment for her CFC services (which included her caretaker) would be terminated on November 21, 2015, that she could reapply at any time, that she could appeal to the Board, and that she could receive continuing benefits if she appealed before the termination date. The notice did not tell her that she had a right to request a new variance.

11. The petitioner timely appealed the decision on November 19, 2015, with the help of her attorney and has continued to receive payment for caretaker services through CFC. She has never returned to Vermont.

12. Two status conferences were held subsequent to the appeal on December 28, 2015 and January 13, 2016. At the first status conference, DAIL requested the petitioner to provide further information showing that she had continuing contacts with Vermont. The petitioner provided what purported to be rent receipts for an apartment in eastern Vermont. At the status conference on January 13, 2016, DAIL asked for information that might indicate there was a medical necessity for remaining out of state. The day before the hearing, the petitioner provided information showing that she had not attended the January infusion therapy treatments due

to her illness but had made an appointment with a different provider for "pain therapy" on February 2, 2016. No information was offered as to whether this treatment was for ketamine infusion therapy.

13. Since her appeal in November of 2015, the petitioner has not made a formal or informal request for a second variance to stay in Florida for medical reasons, in spite of being represented by an attorney and in spite of being invited to do so by DAIL in the course of the status conferences. Neither has she presented the documentation of medical necessity that would have supported such a request.

14. As the hearing commenced, the DAIL clinical coordinator confirmed for the record that the termination proposal was based only on the petitioner's remaining out of state past the variance deadline, and that DAIL was no longer claiming that the petitioner had abandoned her Vermont residence. DAIL added that her continued presence outside of the state beyond the period of the variance, prevented the necessary assessment and monitoring processes required by the program's rules and regulations.

15. The petitioner argued that the termination notice was only about her lack of residency and that the hearing should be restricted to that ground, although she did not say

she was not ready to proceed on the other ground. The hearing officer disagreed that the termination notice was only for lack of residency or that the petitioner had not been apprised of the second ground, and the hearing continued.

16. The DAIL clinical coordinator testified that, following the expiration of the term of the variance, she had solicited information from the case manager as to what was happening. She determined that the three-month-ago consultations and the appointment recently made by the petitioner for treatments two months in the future (January 2016) was insufficient explanation of why the petitioner was still out of state. The documents had not indicated that any treatment had actually taken place during the period of the variance and no plan of treatment was provided. There was nothing indicating when the petitioner was expected to return to Vermont. After reviewing the information with the petitioner's case manager, the program supervisor determined to terminate CFC services because the petitioner was out of state beyond the terms of the variance and quite possibly had moved out of state.

17. At the hearing, DAIL's clinical coordinator explained that the Department has concerns about recipients

who go out of state for more than a few days because DAIL policies require its case managers to monitor the relationship between the caretaker and the recipient through bi-monthly "eyes-on contacts" and monthly phone contact to ensure the recipient is in good health, functional, and is being cared for and is not being neglected or exploited. If a recipient must leave the state for more than seven days and wants to maintain payments for the caretaker, the case manager must get a variance from DAIL to do so. Variances are generally limited to 30-60 days if the health, safety, and welfare of the recipient is at stake so as not to thwart DAIL's monitoring timelines. The petitioner was given an unusual 90-day variance because it appeared to DAIL at the outset that she was indeed seeking medical care and because the petitioner had estimated that it would be completed by October of 2015. Her failure to return meant that DAIL could not pursue necessary monitoring for an indefinite period of time.

18. Of particular concern to the case coordinator was that the petitioner's failure to return to Vermont meant that she would not be able to attend a mandatory annual face-to-face assessment which was scheduled in early December. Care plans expire yearly and this assessment is needed to put a

new plan of care in place. There is no way that DAIL can conduct this review for anyone who is out of state.

19. At hearing, the petitioner maintained that she has not permanently moved to Florida, a contention which DAIL does not currently dispute. The petitioner continues to maintain that she must remain in Florida for the purpose of getting infusions and plans to return to Vermont whenever that gets done. She agrees that she got the variance notice and that she knows that it said it expired "when she returned in October of 2015" but she says she thought it meant that the variance expired "when she returned" so she had taken no efforts to return after October 31.

20. At the hearing, the petitioner put forth little information beyond what she had already provided in November of 2015. Her sole new contribution was that she had failed to attend the January 4-7, 2016 ketamine therapy infusion treatments due to the flu and had made an appointment with a different clinic for February 2, 2016. She said she had switched doctors due to insurance issues. She did not confirm that this treatment at the new clinic was for the ketamine infusion therapy that had brought her to Florida.

21. The petitioner explained that she had not received treatment during the period of her three-month variance

because of blood pressure and diabetes issues. She did not claim or offer any evidence that she had obtained any treatment to ameliorate these problems during the time she was there in spite of advice she had received from the ketamine infusion therapy clinic to do so. The petitioner appears to have only made an appointment for the actual treatment in January of 2016 when her variance was about to or had expired. She did not say that she planned to get any medical help prior to the January treatment regime to help lower her blood pressure or control her diabetes.

22. The petitioner offered what purported to be rent receipts showing that she was still paying rent on an apartment in Vermont. DAIL objected to the authenticity of the receipts. The hearing officer took the objection under advisement but DAIL's clarification that the termination did not involve a change of residency made the rent receipts irrelevant and, thus, inadmissible. However, if the petitioner's testimony that she is paying $700 of rent per month in Vermont is taken at face value, it must be found that the petitioner is now paying $2,500 per month for housing, an oppressive amount for a person with income so limited that she is eligible for SSI-related Medicaid and Food Stamps. The petitioner says that she is borrowing the

money from her caretaker and plans to pay her back from the proceeds of a legal settlement of a personal injury lawsuit that she is pursuing.

23. There is no evidence that the petitioner has ever obtained any "ketamine infusion treatments," which were the stated reason for her extended out-of-state stay. After a possible two month wait for an appointment, such treatments were expected to last for four consecutive days. The ninety-day variance she received should have been sufficient to allow for those treatments as the petitioner first asserted. The petitioner has broken off her relationship with the ketamine infusion therapy clinic and says she will seek some kind of pain treatment at a different clinic in February of 2016. There is no evidence that the petitioner has a present need to remain in Florida to obtain ketamine therapy infusions.

24. The hearing officer asked the petitioner at hearing if she would be willing to return to Vermont at once for assessments and caretaker monitoring in order to avoid termination of her benefits. The petitioner said that she could not fly or drive back to Vermont per her doctor's orders but she did not offer to obtain medical evidence backing up those allegations nor explain why she was well

enough to travel from Vermont to Florida by car a few months earlier. She added that she does not have the gas money to come back to Vermont although she claims to have had access to sufficient money to simultaneously pay for rent back in Vermont and a hotel room in Florida for six months. The petitioner could offer no plan or time frame for return to the state. The petitioner's insistence that she is now prevented by medical and financial reasons from returning to Vermont is not credible.

ORDER

DAIL's decision terminating the petitioner's Choices for Care services is affirmed.

REASONS

DAIL has the burden of proving by a preponderance of evidence that it has a factual basis for terminating a recipient of Choices for Care (CFC) benefits. In this case, DAIL gave the petitioner two alternative factual bases for terminating payments to her personal care attendant because she continued to remain out of the state. The first was that she appeared to have moved permanently out of state such that she was no longer a resident. The alternative was that she was a Vermont resident but was out of state for longer than

the previously awarded travel variance. DAIL dropped the first basis during the appeal process. What it solely relies on now is that the petitioner stayed out of state beyond the period of a variance granted to her.

The Choices for Care Medicaid 1115(a) program operates to provide elderly and disabled persons with assistance in their homes to avoid institutionalization wherever possible. Choices for Care 1115 Long-term Care Medicaid Waiver Regulations, Effective February 9, 2009 (hereafter "Regulations"), §§ I and II. A person who meets the "highest needs" level of care, such as the petitioner, can only be served if she does not have income in excess of SSI-related Medicaid eligibility levels. Regulations, § IV. D. (1). A "highest needs" person is also eligible for personal, respite, and companion care services, up to a certain amount of hours, as needed. Regulations, § VIII A. The provision of the services is made pursuant to a yearly plan which requires monitoring by a case manager. Regulations, § III 8. Recipients must undergo an assessment on an annual basis to continue eligibility. Regulations, § VIII B. The regulations allow a variance from any of the requirements if:

1. The variance will otherwise meet the goals of the Choices for Care waiver; and

> 2. The variance is necessary to protect the health, safety or welfare of the individual. The need for a variance must be documented and documentation presented at the time of the variance request.
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> . . .
>
> Regulations, § XI A.

To obtain a variance, a recipient must provide:

> 1. A description of the individual's specific unmet need(s);
>
> 2. An explanation of why the unmet need(s) cannot be met; and
>
> 3. A description of the actual/immediate risk posed to the individual's health, safety or welfare."
>
> Regulations, § XI A.

DAIL has adopted a number of written policies for carrying out the provisions in the above program regulations. These policies specifically require that "all services be monitored on a regular basis to ensure that the participants' needs and person-centered goals are identified and the desired outcome of individuals are being met." Vermont Department of Disabilities, Aging and Independent Living, Choices for Care, Long-Term Care Medicaid Program Manual (hereafter "Manual") § V.4. Further, the manual specifically requires that:

> The case manager shall have monthly contact with the individual. Face-to-face visits must occur not less than

> once every 60 days. [Emphasis in the original.] At a minimum, an annual face-to-face visit must be in the home of the individual.
>
> Manual, § V.4(A)(1)

The annual face-to-face visit involves a "comprehensive reassessment" with both the case manager and the recipient in attendance as well as a health assessment completed by a nurse. Manual, § V.3. II.(A).

The manual specifically requires case managers to monitor the recipient's "health and functional status, environmental needs, health and welfare issues, abuse, neglect and exploitation issues, social and recreational needs, public benefits including CFC financial eligibility, participant and surrogate employer certification status, family issues, coordination with CFC providers, needs-related or other services outside of DVD, and goals and outcomes related to the person-centered plan." Manual § V.4 (A)(2). Personal Care Service providers are vetted and are subject to a number of federal and state regulations and background checks and may only provide approved services. Manual § IV.3.(B),(E)(1)-(7).

In order to carry out these monitoring functions, DAIL adopted a further policy that "[p]ersonal care services shall not be provided to a participant who has left the state of

Vermont for more than 7 consecutive days." Manual § IV.3(E)(11). If an active participant is "out-of-state for a period exceeding 30 continuous days," the regulations require that "DAIL staff will send a notice of ineligibility with appeal rights to the individual." Manual § V.7(B)(5).

Under the above regulations and policies, the petitioner is limited to leaving the state with her caretaker for seven days at a time and is subject to termination of payment for her caretaker service after a 30 days' continuous period of absence from the state. The petitioner here had already been out of state over three weeks when DAIL learned of her absence. DAIL asked her case manager to document her need for a variance to be out of state beyond the 30-days. Based on the information provided, DAIL determined that the petitioner had shown a safety, health or welfare reason to be out of state based on her seeking ketamine injection therapy and actually allowed her 90 days to complete the treatment, an allowance at least 30 days in excess of the usual variance, based on representations from the petitioner that she needed that time to finish treatment. In accordance with its policy, DAIL notified the petitioner in writing of the terms of the variance, with an ending date of "when you return in October of 2015." When she had not returned, DAIL

asked for further information from the case manager. When no information came in showing that the petitioner had actually engaged in any treatment and had just made her first appointment for January of 2016, DAIL saw no reason to excuse the failure to return and notified the petitioner that she would be terminated for overstaying the variance pursuant to its above regulations which mandate closure in such circumstances.

The facts here indisputably show that the petitioner did stay in Florida beyond the variance granted to her. Although she says that she did not understand that she was to return by October 31, 2015, the notice itself is not to blame for that misunderstanding as it plainly said that the variance period was for an "effective date starting on July 28, 2015 until you return to Vermont in October 2015." Nothing in that variance award notice could be fairly interpreted as meaning that DAIL was giving the petitioner carte blanche to return whenever she wished. In addition, it does not appear that the petitioner would have returned even if she had understood the deadline as she continues to stay in Florida in spite of the fact that she had also been notified by DAIL on November 5, 2015, that it considered her

continued absence from the state a grounds for termination of her CFC services.

The petitioner complained that DAIL erred in terminating her CFC services because 1) DAIL was required to continue her variance until it had proof that she no longer had a medical reason for being out of state, and 2) DAIL was required to notify her that she could ask for a new variance before her services were terminated. The petitioner is not correct that her variance should have continued beyond the stated termination date. A variance, unlike a grant of benefits, is a discretionary exception to the usual operation of rules that has a definite ending date. That ending date was on the variance notice and the petitioner had no protected interest in that variance beyond the termination date. The petitioner is correct that she should have been advised that she could request a new variance as part of the notice of termination. A regulation adopted by DAIL does specifically direct that a decision regarding a participant's eligibility requires a written notice of decision that, in addition to the basis, legal authority, right to appeal, and information on how to appeal, "shall include . . . the right to request a variance." Regulation § IX.

Even if the Department's failure to tell the petitioner in November of 2015 of her right to request a variance violated its own regulations, she became fully aware of that right through her attorney while this process was under appeal and while her benefits are still continuing. She had two months before her hearing to request a new variance and to provide the necessary documentation, which to date she has not done.

Nevertheless, the petitioner argues that this violation, as well as switching the basis for the termination action at her hearing, violated her due process rights under the 14th Amendment to the U.S. Constitution. The Supreme Court in *Goldberg v. Kelly* 397 US 254 (1970) tells us that in the context of essential public benefits, like health benefits, due process requires adequate and timely notice of the reasons for termination, the right to an evidentiary hearing regarding those reasons (including the right to present a defense and to confront adverse witnesses before an impartial hearing officer), and the right to a written decision based on the evidence and pertinent legal rules, *before the termination takes place.* The petitioner, who continues to receive CFC services, has received all of these protections in the process of her appeal. As discussed above, any due

process violation that may have occurred when DAIL failed to inform her that she could request a variance was cured when she became aware of that right and had an opportunity to pursue it prior to the termination of her benefits. Neither can a violation of her right to due process be found with regard to the basis for DAIL's decision. DAIL's termination notice clearly informed the petitioner that DAIL was pursuing two alternative theories for termination and she had a chance to prepare for and answer both. She cannot claim surprise that the second (remaining out of state in violation of the variance) was the one actually relied on at hearing as DAIL asked the petitioner to present evidence of her current medical treatment plan of care before the hearing, a request which is consistent with consideration of whether the petitioner had a right to a second variance. The petitioner's claim of lack of due process in this circumstance is totally without merit.

The petitioner further argues that DAIL's CFC regulations requiring the termination of services for persons who are out of state in excess of regulatory time-limits (including variances) is at odds with general regulations in the Medicaid program. The petitioner relies upon general provisions of the Medicaid regulations which require AHS to

provide "health benefits to an eligible Vermont resident," even when that resident might be outside of Vermont. Health Benefits Eligibility and Enrollment (Hereafter HBEE) § 21.01), and § 21.14). She argues that under the regulations, her "temporary absence" from the state does not destroy her residency for purposes of receiving benefits under the Medicaid program. HBEE § 21.13. She points out that those regulations define "temporary absence" as leaving the state "with the intent to return when the purpose of the absence has been accomplished," including for the purpose of seeking "necessary medical care." HBEE 21.13(a) and (b). Her argument is that since DAIL no longer disputes that she is a Vermont resident, none of her Medicaid benefits can be terminated because she has temporarily left the state.

The petitioner would be correct if the Department for Children and Families were trying to terminate her general Medicaid *program eligibility* because of her temporary absence from the state. However, DCF is not taking that action. Rather DAIL is taking action to terminate services *under the Medicaid CFC waiver program.* Its authority to do so is found in the following Medicaid regulation:

> An individual must be a resident of Vermont at the time a medical service is rendered in order for Vermont Medicaid to pay for that service. The service, however,

> does not have to be rendered in Vermont subject to certain restrictions.
>
> Emphasis supplied, HBEE § 21.14

This regulation allows for the provision of some services under the Medicaid program to a recipient while she is outside of the state of Vermont. However, the regulations make it clear that the state retains the right to restrict the provision of some other services when the recipient is living out of Vermont. The particular CFC services here are among those services that the state has chosen to restrict, and DAIL has offered a substantial justification for this restriction. These services are provided under a special Medicaid waiver for elderly and disabled persons which allows home services for persons who would ordinarily require some level of institutionalization. Unlike most Medicaid-covered physician, hospital and pharmacy services, CFC caretaker services are provided by persons without licenses who are expected to assist according to a plan which has been drawn up to prevent institutionalization. DAIL has chosen a strict monitoring process to ensure that CFC caretakers are suitable and that they are carrying out the care plans as directed. The petitioner makes no argument that DAIL is acting outside of the scope of its authority to require close monitoring of

these services. Therefore, the petitioner's reliance on the general Medicaid provisions to defeat DAIL's action here is unavailing.

It must be concluded that DAIL had ample factual and policy grounds to terminate the petitioner's CFC services when she stayed beyond the time limits of her variance which ended in October of 2015. The petitioner made it clear at hearing, and by her actions subsequent to the proposed termination, that she had no intention of returning in the fall and still has no definite plan to come back. Her protestations that she has medical and/or financial obstacles to returning to Vermont, as noted in the fact findings, are simply not credible. Her resistance to returning to Vermont thwarts DAIL's ability to carry out her annual assessment and to draw up a new plan of care for her, as well as to monitor

her ongoing situation.[1] And, while DAIL should have offered the petitioner an opportunity to request a new variance when the termination of her CFC services was proposed last fall, the petitioner has had every opportunity going forward to ask for a new variance and provide documentation that medical necessity compelled her to stay on in Florida beyond the deadline of the first variance but has not taken any action to do so in the two months between her appeal request and the hearing. What little evidence the petitioner offered showed only that she went to Florida to obtain treatment from a particular ketamine infusion therapy clinic and, six months later, had broken off her relationship with that clinic without ever having obtained any treatments and without demonstrating a future plan to obtain ketamine infusion therapy elsewhere.[2] If the petitioner had requested a new variance based on the facts she presented at hearing, she

[1]DAIL's monitoring needs are more than theoretical in this case. The petitioner's assertion that her caretaker has financed her trip to Florida, including a hotel room costing $1,800 per month for which the low-income petitioner is expected to provide repayment, is a prime example of the kind of problematic situation that can develop between a recipient and her caretaker. DAIL needs to be aware of the relationship between the caretaker and the recipient in order to guard against possible exploitation of the recipient or inappropriate behavior on the part of the caretaker.

[2]Further undermining the petitioner's assertion that she has a medical need to stay in Florida, is the observation by the ketamine-infusion-therapy clinic physician in his initial evaluation that the petitioner is a less-than-ideal candidate for this therapy because of other medical conditions which put her at "very high risk" for complications.

would have fallen far short of demonstrating medical necessity to stay in Florida. As DAIL has met its burden of showing that the petitioner has stayed out of state in violation of time limits in its rules, including the extension contained in her written variance, the Board must affirm the termination of the petitioner's CFC services. 3 V.S.A. § 3091(d), Fair Hearing Rule 1000.4 (D). As DAIL advised the petitioner, she can return to Vermont and reapply at any time.

# # #